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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

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9 Alan N. Ariav,) No. CV03-464-TUC-MHM
10 Plaintiff,)
11 vs.) **ORDER**
12 Mesch, Clark & Rothschild, P.C.,)
13 Defendant.)
14 _____)

15 Currently before this Court is Defendant's Motion to Stay this Matter Pending the
16 Resolution of an Interlocutory Appeal (Dkt. #133). Having reviewed the pleadings, the
17 Court issues this Order.

18 On September 29, 2005, the Court denied Defendant's motion to dismiss for lack of
19 subject matter jurisdiction, and ordered the parties submit a case management plan and
20 proposed Rule 16 scheduling orders. On October 27, 2005, a Scheduling Conference was
21 held pursuant to Rule 16(b) of the Federal Rules of Civil Procedure. During the conference,
22 the parties articulated their opposing positions regarding whether a stay of this litigation is
23 appropriate and counsel have also provided the Court supplemental briefing. Dkt. ##133,
24 135.

25 On October 4, 2005, Defendant filed a notice of its appeal of the Court's 9/29/05
26 Order to the Ninth Circuit. Defendant's timely filed notice of appeal divests this Court of
27 jurisdiction over the issue of its subject matter jurisdiction. Griggs v. Provident Consumer
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1 Discount Company, 459 U.S. 56 (1982); City of Los Angeles, Harbor Division v. Santa
2 Monica Baykeeper, 254 F.3d 882 (9th Cir. 2001). Plaintiff argues “the improvident taking
3 of an appeal cannot effectively destroy the authority of the court below to proceed upon
4 motions properly before it.” Ruby v. Sect. of U.S. Navy, 265 F.2d 385, 388 (9th Cir. 1966).
5 Plaintiff argues Defendant’s appeal is deficient because “denial of a motion to dismiss, even
6 when the motion is based upon jurisdictional grounds, is not immediately reviewable.” Catlin
7 v. U.S., 324 U.S. 229, 236 (1945). Further, Plaintiff argues the extraordinary writ of
8 mandamus is not available because the jurisdictional finding depends upon a finding of fact
9 made upon evidence which is not in the record. In Re Chicago, R.I. & Pac. Ry., 255 U.S.
10 273 (1921).

The Court has considered the parties respective positions. While the Court is aware that two-years after commencing this litigation, Plaintiff seeks to proceed pass the issue of subject matter jurisdiction, the Court finds a stay is appropriate. The issue of jurisdiction in a FMLA case is intertwined with the merits, and therefore, any discovery in this matter would necessarily implicate the jurisdictional issue on appeal. Further, any contention that the delay in this litigation is due solely to Defendants is not supported by the record. At a minimum, Plaintiffs failed to timely raise the issue of the applicable time period under the FMLA. Additionally, Defendant has averred it will seek a speedy resolution of its appeal. Finally, the Court would be aided by resolution of whether in the Ninth Circuit the question of eligible employer status implicates both jurisdiction and the merits, and is properly reserved for the finder of fact. Morrison v. Amway Corp., 323 F.3d 920, 928 (11th Cir. 2003).

23 **IT IS THEREFORE ORDERED** that Defendant's Motion to Stay this Matter
24 Pending the Resolution of an Interlocutory Appeal is **GRANTED**. (Dkt. #133). This matter
25 is stayed pending adjudication of Defendant's appeal of the Court's 9/29/05 Order.

DATED this 8th day of November, 2005.

Mary H. Murgula
United States District Judge